



November 16, 1999

Ms. Jeri Yenne
Criminal District Attorney
Brazoria County Courthouse
111 East Locust, Suite 4008A
Angleton, Texas 77515

OR99-3277

Dear Ms. Yenne:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 129426.

The Brazoria County Criminal District Attorney (the "Brazoria County") received a request for the "deposition given by Judge David Christian in the civil case of Knight . . . a sexual harassment suit." You submit to this office the responsive deposition for our review. You seek to withhold the requested information under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information.

At the outset, we note that the pending request is related to an earlier open records request. In Open Records Letter No. 99-2036 (1999), the requestor requested the "EEOC charge/complaint and the county's response" in a matter involving David Christian, a Brazoria County justice of the peace. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied); Open Records Decision No. 155 (1977) (employer's disclosure of information relating to claim of employment discrimination under 42 U.S.C. § 2000e-8(e)). Since the information responsive to the pending request was not responsive to ORL 99-2036 (enclosed), we must address whether the deposition at issue is subject to the claimed exception.

Section 552.103(a), the "litigation exception" excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Brazoria County has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Brazoria County must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, Brazoria County must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Based on the ORL 99-2036, we understand that there is a pending complaint with the Equal Employment Opportunity Commission (EEOC) against Brazoria County and one of its justices of the peace based on allegations of discrimination. You further state that "an administrative trial before the administrative law judge was conducted from April 14 through April 16, 1999. No decision has been rendered in the matter, and the administrative law judge has up to 270 days to render a decision in the case." This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated, and therefore meets the first prong of the section 552.103(a) test. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that a complaint has been filed with the EEOC, we agree that you have shown that the requested records are related to pending or anticipated litigation. Thus, Brazoria County has met both prongs of section 552.103(a).

Generally, however, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.¹ Specifically, we note that although Brazoria County has established that litigation is pending and that the deposition transcript is related to the litigation, it is also evident that the deposition has been seen by the opposing party. Therefore, Brazoria County may not withhold the deposition under section 552.103(a) from the requestor. Accordingly, we must consider whether portions of the submitted deposition are subject to your other claimed exception.

Section 552.101 excepts from public disclosure information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. You claim that portions of the submitted records must be withheld under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). In that opinion, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents. *Id.*

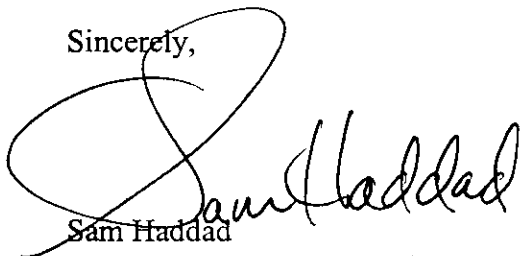
The material at issue here does not include investigatory materials or a summary such as were before the *Ellen* court. In our opinion, in order best to comport with the *Ellen* decision, you should release the deposition with the information identifying victims/witnesses redacted. Although you assert that certain specified information within the deposition is “confidential by law” we disagree with your suggested redactions. After our review of the

¹Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

deposition, we advise Brazoria County that the only information which may be redacted under *Ellen* consists of the identifying victim/witness information. The remaining portions of the deposition must be released to the requestor.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad", written over a large, loopy flourish.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 129426

Encl.: Submitted document
Open Records Letter No. 99-2036 (1999)

cc: H. M. Atchison
P. O. Box 1181
Fresno, Texas 77531
(w/o enclosures)

²To the extent the responsive records contain confidential information, we advise you to exercise caution in releasing the information to the public. See Gov't Code § 552.352.